No. 93-1504

In The

Supreme Court of the United States

October Term, 1994

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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STATUTES AND RULES INVOLVED

11 U.S.C. § 105(a) provides, in pertinent part:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

28 U.S.C. § 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Rule 62(d) of the Federal Rules of Civil Procedure provides:

> **Stay Upon Appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 65.1 of the Federal Rules of Civil Procedure provides, in pertinent part:

> Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the

bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action.

STATEMENT OF THE CASE

On August 17, 1987, Respondents Bennie and Joann Edwards ("the Edwards") filed a lawsuit against Petitioner Celotex Corporation ("Celotex") and fifteen other companies in federal court in their home town of Wichita Falls, Texas. R. 1.[1] The Edwards alleged that Bennie Edwards had developed disabling lung disease as a result of his work in the State of Texas with and around asbestos insulation products made by each of the defendants or their respective predecessors in interest.[2] R. 1-7. As a result of his disease, the Edwards alleged, Bennie Edwards had incurred medical expenses, sustained a loss of his earning capacity, and experienced progressive physical discomfort and mental distress, and his wife Joann had suffered the loss of her husband's consortium and support. R. 10-13. The Edwards asserted that under Texas law each defendant was jointly and severally liable

[1] Citations to the record appear as "R. ___." The portions of the record included in the Appendix to Celotex's Petition for Certiorari are cited as "P.A. ___." Citations to the Joint Appendix appear as "J.A. ___." Citations to the Appendix to the Brief *Amicus Curiae* of Northbrook Property and Casualty Insurance Company appear as "N.A. ___."

[2] As Celotex points out in its brief at 5, its liability was predicated on its status as corporate successor to the Philip Carey Manufacturing Company, a long-time manufacturer of asbestos insulation products. J.A. 19-21.

for the Edwards' damages and independently liable for punitive damages. R. 6-10, 12.

The Edwards' case came to trial in April of 1989. All of the remaining defendants except Celotex settled with the Edwards. After a five day trial, during which Celotex vigorously challenged the Edwards' allegations of causation, liability, and damages, the jury returned a verdict awarding the Edwards $491,000.00 in compensatory damages. R. 1291-93. The jury also assessed Celotex $245,500.00 in punitive damages. R. 1300. Applying Texas law, the district court reduced the award of compensatory damages by the percentage of responsibility for the Edwards' injuries allocated by the jury to the defendants that had settled prior to trial. On April 17, 1989, the court entered final judgment in favor of the Edwards and against Celotex in the amount of $35,525.80 in compensatory damages and $245,500.00 in punitive damages. P.A. 24-25. The judgment became enforceable ten days after the entry of judgment, on April 27, 1989. FED. R. CIV. P. 62(a).

To stay execution of the judgment pending appeal, Celotex filed a supersedeas bond in favor of the Edwards executed by Northbrook Property and Casualty Insurance Company ("Northbrook") in the amount of $294,987.88, and moved the district court to approve the bond. The bond contained the customary language "bind[ing]" Northbrook to pay the Edwards the amount specified by the bond unless Celotex "shall prosecute said appeal and answer to Bennie Edwards and Joann Edwards for all damages, interest, and cost." J.A. 12-13. Celotex's motion to approve the bond did not disclose that Celotex had obligated itself to reimburse Northbrook in the event that Northbrook was required to pay on the bond, nor did the motion reveal that Celotex had secured its reimbursement obligation to Northbrook with

property in which Celotex had an interest. The Edwards did not oppose the motion to approve the bond, and the district court approved the bond on June 5, 1989. J.A. 11. Upon approval of the bond, the stay of the judgment became effective. FED. R. CIV. P. 62(d).

On appeal, Celotex challenged the punitive damage element of the judgment as unconstitutional, excessive, and insupportable under applicable substantive law. A Fifth Circuit panel unanimously rejected Celotex's contentions, and affirmed the judgment in its entirety in an opinion and judgment issued September 20, 1990. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151 (5th Cir. 1990), J.A. 18. Celotex did not file a motion for rehearing. Under Rule 41 of the Federal Rules of Appellate Procedure, the mandate was due to be issued on October 11, 1990. The clerk of the Fifth Circuit actually issued the formal mandate on October 12, 1990.

On the afternoon of October 12, 1990, Celotex filed a petition for reorganization under Chapter XI of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. Under 11 U.S.C. § 362(a), the filing of the petition automatically stayed all judicial proceedings against Celotex. Because the mandate of the Fifth Circuit had issued, however, the Edwards' case was complete at the time of the bankruptcy, and the judgment was then enforceable against Celotex and its surety Northbrook.[3]

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[3] Aetna Casualty and Surety Company has filed an *amicus curiae* brief asserting that a critical "assumption" in the question accepted by the Court for review – that the Edwards' judgment against Celotex was final and enforceable at the time of Celotex's bankruptcy filing – is unsupported by the record. Aetna bases its assertion on two assumptions of its own: the legal assumption that the Fifth Circuit's mandate was not effective to conclude the appeal and make the judgment final and enforceable until it was physically received by the district court, and the factual assumption that because the Fifth Circuit issued the mandate on the date of the bankruptcy, the district court "presumptively" did not receive the mandate until after the bankruptcy filing. Aetna Br. at 6-7. Because the case was still technically on appeal at the time of the bankruptcy, Aetna argues, the judgment never became final due to the application of the automatic bankruptcy stay, 11 U.S.C. § 362(a)(1). Aetna Br. at 8. Accordingly, Aetna contends, the Court lacks jurisdiction over this case. Aetna Br. at 9-10.

Aetna's attempt to persuade the Court to avoid the merits should fail for three reasons. First, Aetna's legal premise is incorrect: "the appellate process is terminated . . . when an appellate court *issues* its mandate of affirmance." *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983) (emphasis added); *accord United States v. DiLapi*, 651 F.2d 140, 144 n.3 (9th Cir. 1981) (relying on issuance of mandate from court of appeals as event that returned jurisdiction to the district court, even though record did not disclose when mandate from the court of appeals was received in the district court); *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986) ("[w]hen an appellate mandate is issued, a district court reacquires jurisdiction"). Second, Aetna's factual premise is wrong; the record reveals that for whatever reason, the district court actually received the judgment and mandate of the court on October 10, 1990, two days before it was formally issued. R. 1417, 1418; Docket Sheet at 16. Finally, even if the automatic stay applied to the appeal, it would not affect the finality of the order on the Edwards' subsequent motion to enforce the bond against Northbrook. Thus, this Court has jurisdiction over this proceeding, and should decide the question presented for review.

Five days after the bankruptcy filing, on the application of Celotex and without prior notice to the Edwards, the bankruptcy court entered an emergency ex parte order purporting to enjoin "all entities" from "commencing or continuing any judicial, administrative, or other

proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the debtors or (c) the appellant in an appeal is one of the debtors." P.A. at 28. The order was not specifically directed to the Edwards, or to any other party in particular. Moreover, the order on its face purported to restrain only efforts to enforce judgments or debts "against the debtor or against property of the debtor," P.A. 27, and expressly refrained from enjoining actions to collect on debts owed by third parties, P.A. at 28-29, ¶ 5. As authority for the issuance of the order, the bankruptcy court cited §§ 105 and 362 of the Bankruptcy Code. P.A. 26.[4]

After the bankruptcy court issued its ex parte stay order, many plaintiffs with bonded judgments against Celotex on appeal, including some represented by counsel for the Edwards, sought clarification, modification, or

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[4] The order did not comply with the requirements for the issuance of a temporary restraining order or preliminary injunction of FED. R. BANKR. P. 7065 and FED. R. CIV. P. 65, in that

- it was issued without notice to any of the "entities" that it purported to affect, and did not state the reasons why the order was granted without notice (FED. R. CIV. P. 65(b));
- it did not expire by its terms within ten days of the date of its entry (FED. R. CIV. P. 65(b));
- it did not recite in any meaningful way "the reasons for its issuance" (FED. R. CIV. P. 65(d)); and
- it purported to bind "entities" who were not formal parties to the action (FED. R. CIV. P. 65(d)).

Indeed, though it contained injunctive language, the order was couched not as an injunction but as an order "extending" the automatic stay.

dissolution of the order.[5] Meanwhile, claimants whose bonded judgments against Celotex had, as of the date of the bankruptcy, survived appeal and were enforceable began to attempt to execute against the sureties on the supersedeas bonds securing the judgments in the courts in which the bonds had been posted. On January 2, 1991, a federal court in Norfolk, Virginia granted a motion under Rule 65.1 of the Federal Rules of Civil Procedure by four plaintiffs to release a supersedeas bond securing a judgment against Celotex, notwithstanding the bankruptcy court's stay order.[6] R. 1453-61. On May 3, 1991, the Edwards filed a similar motion, asking the district court in Texas to enforce the terms of the supersedeas bond executed by Northbrook despite the bankruptcy court's order. R. 1423. In their supporting memorandum, the

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[5] Although it is true that the Edwards' counsel, on behalf of other clients with bonded judgments that were still pending on appeal, filed pleadings in the bankruptcy court challenging the stay order, the implication by Celotex and the flat assertion by Northbrook that counsel had appeared on behalf of the Edwards in the bankruptcy court prior to filing their Rule 65.1 motion (*see* Celotex Br. at 8-11 and Northbrook Br. at 6 n.2 and 18) is misleading and unsupported. The Edwards have filed no claim against Celotex in the bankruptcy, and have consistently maintained that the bankruptcy court lacks subject matter jurisdiction to enjoin enforcement of, and to affect their interest in, the supersedeas bond approved by the federal court in Texas. *See* Joint Status Report filed February 3, 1992 (J.A. 59-60). The Edwards did answer an adversary proceeding to invalidate the bonds, filed by Celotex almost two years after the bankruptcy court's initial stay order, subject to an objection to the bankruptcy court's subject matter jurisdiction. N.A. 152-53.

[6] The order was later reversed by the Fourth Circuit. *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993).

Edwards candidly advised the district court of the bankruptcy court's October 17, 1990 stay order, R. 1447, 1450-52, but contended that the bankruptcy court was "simply without jurisdiction" to stay enforcement of an obligation in which Celotex had no property interest. R. 1447. Both Celotex and Northbrook opposed the motion, arguing both that the proceeding against Northbrook was stayed under 11 U.S.C. § 362 and that the Edwards had been effectively enjoined from attempting to enforce the bond by the bankruptcy court's October 17, 1990 order. R. 1524-47 (Celotex opposition); J.A. 28-33 (Northbrook opposition).

On June 13, 1991, nearly six weeks *after* the Edwards filed their motion in Texas, the bankruptcy court issued an "omnibus order" clarifying the intended scope of its October 17, 1990 stay order. *In re Celotex*, 128 B.R. 478 (Bankr. M.D. Fla. 1991), P.A. 30. In its omnibus order, the bankruptcy court asserted for the first time that its October 17, 1990 order extending the § 362 automatic stay was additionally intended to enjoin persons who, like the Edwards, had final, enforceable judgments against Celotex at the time of the bankruptcy from pursuing remedies against the third parties that had issued supersedeas bonds securing the judgments. 128 B.R. at 484-85, P.A. 46. The bankruptcy court acknowledged that Celotex had no property interest in such bonds; upon the successful completion of the appeals by the judgment creditors, the court noted, Celotex's "reversionary" interest in the supersedeas bond had been "divested." 128 B.R. at 481, 482, P.A. 36, 39-40. Accordingly, the court observed, the § 362 stay of proceedings "against the debtor or against the debtor's estate" did not preclude enforcement of supersedeas bonds securing judgments that were final at

the time of the bankruptcy. *Id.* The bankruptcy court nevertheless purported to find authority to enjoin enforcement of supersedeas bonds in which Celotex has no property interest in § 105 of the Bankruptcy Code. The court theorized that enforcement of supersedeas bonds against third parties might in some way impede Celotex's ability to formulate a plan of reorganization, and suggested that in "mega" bankruptcy cases involving "multi-million dollars in claims and assets," the powers of the bankruptcy court under § 105 "*must in the initial stage be absolute*, unless limited by the Bankruptcy Code *or other federal laws*." 128 B.R. at 484, P.A. 44 (emphasis added). Finally, the bankruptcy court hypothesized that some or all of the bonds could be set aside as preferential or fraudulent transfers, and that claims on judgments awarding punitive damages could be subordinated or disallowed. 128 B.R. at 484, P.A. 45. The court made this observation even though, eight months after filing the bankruptcy and obtaining the stay order, Celotex had not even *commenced* any proceeding to invalidate or avoid the supersedeas bonds.

In light of the bankruptcy court's recognition that Celotex did not have a property interest in the supersedeas bond that secured the Edwards' judgment, and with the belief that the bankruptcy court therefore lacked jurisdiction to enjoin proceedings against third parties involving the bond, the Edwards pressed their motion against Northbrook under Rule 65.1 in the district court in Texas. Celotex filed a supplemental response to the Edwards' Rule 65.1 motion in the Texas court, alerting the court to the bankruptcy court's omnibus order. J.A. 53-56. In a joint status report requested by the Texas court, Celotex and Northbrook reiterated their objections to the

proceeding based on the bankruptcy court's stay orders and the automatic bankruptcy stay. J.A. 57-63. Fully apprised of the bankruptcy court's stay orders and of the jurisdictional objections of Celotex and Northbrook, the district court nonetheless granted the Edwards' motion to enforce Northbrook's obligation under the supersedeas bond on May 27, 1991. P.A. 23. Celotex timely appealed. J.A. 64-65.

The Fifth Circuit affirmed, holding the § 362(a) automatic stay inapplicable and the bankruptcy court's extraordinary § 105 stay order ineffective to prevent the Edwards from recovering against Northbrook. *Edwards v. Armstrong World Indus., Inc.*, 6 F.3d 312 (5th Cir. 1993), P.A. 1. The Fifth Circuit first rejected Celotex's contention that the Edwards' motion against Northbrook was a proceeding "against the debtor or against property of the estate" stayed under § 362(a). Citing the bankruptcy court's own omnibus order, the Fifth Circuit held that because "the appellate process had been completed and Celotex no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, the automatic stay provisions will not prevent Northbrook from fulfilling its obligation."[7] 6 F.3d at 317, P.A. 13.

The Fifth Circuit then addressed the "more difficult issue" of whether the district court should have denied the Edwards' motion in deference to the bankruptcy court's § 105 stay order. 6 F.3d at 317, P.A. 13. The court observed that 28 U.S.C. § 1334(b) extends the subject matter jurisdiction of the bankruptcy courts to matters

[7] On this issue, the Fifth Circuit's decision is consistent with that of the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146, 148-49 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993).

"related to a case under title 11," and noted Celotex's threshold contention that "under this jurisdictional grant, the equitable powers of the bankruptcy court are sufficient to stay a proceeding to release the supersedeas bond." 6 F.3d at 318, P.A. 14. It then "sharpened" the issue to consider "whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here."[8] *Id.*

The Fifth Circuit explained that a bankruptcy court's jurisdiction does not extend to proceedings involving property in which, as in this case, the debtor has no

[8] Northbrook's suggestion that the Fifth Circuit did not question the bankruptcy court's subject matter jurisdiction to issue a stay order binding the Edwards and Northbrook, Northbrook Br. at 12, is therefore incorrect. The Fifth Circuit's decision was *premised* on the fact that the bankruptcy court lacked jurisdiction to enjoin the Edwards from proceeding against Northbrook. Although both Northbrook and Celotex attempt to make much of the Fifth Circuit's reference to the bankruptcy court's lack of "authority" and "power" to enjoin the Edwards' proceeding, rather than of the bankruptcy court's lack of "jurisdiction," the choice of terminology is inconsequential, and in fact was invited by Celotex. In its petition for rehearing addressed to the Fifth Circuit panel, Celotex itself confessed that in its "zeal to have the Northern District's order reversed, Celotex did not emphasize its argument regarding jurisdiction and venue and instead argued, in essence, that the court should affirm the Tampa bankruptcy court's temporary stay order." Celotex Petition for Rehearing filed November 19, 1993, at 2 n.3. The Fifth Circuit cannot be faulted for discussing at length the merits of the bankruptcy court's § 105 order when Celotex itself invited the court to do so.

interest. The court acknowledged that § 105 of the Bankruptcy Code authorizes bankruptcy courts to enjoin proceedings against non-bankrupt entities that threaten the integrity of the bankrupt's estate. 6 F.3d at 320, P.A. 18-19. It pointed out, though, that "the integrity of the estate is not implicated in the present case because [Celotex] has no present or future interest in this supersedeas bond." *Id.* The allegation that the bond was collateralized with Celotex's property, the court reasoned, did not affect this conclusion; whether Celotex could assume the surety agreement or avoid it and thus seek return of the collateral was an issue solely between Celotex and Northbrook. 6 F.3d at 320 n.7, P.A. 19. Responding to Celotex's argument that the policies informing the Bankruptcy Code favored centralized, uniform treatment of all Celotex judgment holders, the Fifth Circuit observed:

> Although the idea of using the bankruptcy court as a clearing house for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest. We cannot globalize the bankruptcy court's authority in that manner.

6 F.3d at 319, P.A. 16-17.

The Fifth Circuit also emphasized that § 105(a) should not be construed to grant to the bankruptcy courts power to "eviscerate the very purpose" of supersedeas bonds. 6 F.3d at 319, P.A. 17. The stay of execution of the April 17, 1989 judgment was granted to Celotex, the court noted, only because it furnished the Edwards with a court-approved promise by a third party to pay the judgment after appeal if Celotex were unable, for any reason,

to do so. *Id.* It would be "manifestly unfair," the court reasoned, "to force the judgment creditor to delay the right to collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy." 6 F.3d at 319, P.A. 17-18.

The court acknowledged that in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993), the Fourth Circuit had found that the Celotex bankruptcy court was authorized under § 105 to issue its global stay on execution of supersedeas bonds. It expressly disagreed with the Fourth Circuit's reasoning and conclusion, holding that "[w]hatever the ultimate scope of § 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which the debtor has no interest." 6 F.3d at 320, P.A. 19. Rejecting Celotex's contention that § 105 "gives bankruptcy courts virtually limitless ability to bring parties to heel to its authority," 6 F.3d at 318, P.A. 13, and citing a previous refusal to "bow in complete obeisance to a bankruptcy court stay,"[9] 6 F.3d at 320, P.A. 20, the Fifth Circuit concluded that the district court had acted properly in allowing the Edwards to execute on the supersedeas bond against Northbrook.

To be sure, the bankruptcy court does not share the Fifth Circuit's concern that supersedeas bonds posted to

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[9] The court cited *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586 (5th Cir. 1987), *modified on other grounds*, 835 F.2d 584 (5th Cir. 1988), in which it had held that a bankruptcy court could not enjoin a payment of funds from the obligor on a letter of credit to the beneficiary.

stay execution pending appeal serve their intended purpose. Unlike the Edwards, several persons with final bonded judgments against Celotex elected to acquiesce to the jursidiction of the bankruptcy court and to seek relief from the stay orders directly from that court. On May 29, 1992, more than nineteen months after Celotex filed for bankruptcy protection and two days after the district court granted the Edwards' motion to allow execution on the supersedeas bond, the bankruptcy court issued an order denying the motions for relief from the § 105 stay. *In re Celotex*, 140 B.R. 912 (Bankr. M.D. Fla. 1992), P.A. 47. The bankruptcy court noted that the assets pledged by Celotex to secure the supersedeas bonds comprise a significant portion of Celotex's bankruptcy estate,[10] and speculated that if the bonds were voided under some provision of bankruptcy law, the virtually innumerable unsecured creditors of Celotex would benefit.[11] 140 B.R.

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[10] Celotex alleges that on the date of its bankruptcy, it was jointly liable on about 100 supersedeas bonds, which secured about $70 million in judgments. P.A. 41, 49. Although this number is large, it must be kept in perspective. Prior to the bankruptcy, Celotex had paid out some $360 million in settlement of asbestos-related personal injury claims. P.A. 49 n.2. Celotex has not suggested that any of these payments were preferential or fraudulent, and has not attempted to recoup them for the benefit of the estate. The record is silent on the potential size of Celotex's bankruptcy estate.

[11] The extent of the benefit is, of course, dependent on the number of unsecured creditors. The bankruptcy court's opinion states that over 141,000 suits against Celotex for asbestos-related personal injury or property damage were pending at the time of Celotex's bankruptcy filing. In the years following the bankruptcy filing, an enormous but unknown number of claims have accrued. Even if all supersedeas bonds were voided and the assets securing the bonds made available to unsecured

at 914-16, P.A. 53-57. The bankruptcy court acknowledged that the enforcement of supersedeas bonds is "a matter of risk distribution" and that allowing judgment holders to enforce their bonds against third party sureties "would merely shift the battleground," requiring the sureties to bear the burden of Celotex's bankruptcy in the place of the judgment holders (as, of course, the bonds were intended to do). 140 B.R. at 915, P.A. 53, 52. Inexplicably, however, the bankruptcy court then suggested that payment to the judgment holders on the supersedeas bonds "may foster an apocalypse" and hinder the development of a successful plan of reorganization. 140 B.R. at 915, P.A. 54. Without explanation, the bankruptcy court also suggested that "dissolution of the § 105 stay could transform this case into another *Jarndyce v. Jarndyce*." 140 B.R. at 916, P.A. at 54-55 (citing CHARLES DICKENS, BLEAK HOUSE (1853)).

More than two years have passed since the bankruptcy court issued its order denying relief from the § 105 stay. To date, the bankruptcy court has not given leave for any judgment creditor to collect on a supersedeas bond, making the court's reference to BLEAK HOUSE in its May, 1992 order a sad irony.[12] The adversary proceeding to void all supersedeas bonds issued by Celotex, brought by

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creditors, the benefit to each creditor would be negligible. The professed concern of Celotex and the bankruptcy court for the unsecured creditors of Celotex is unconvincing and pretextual.

[12] One frustrated judgment creditor has filed a complaint with the United States Court of Appeals for the Eleventh Circuit, alleging that the bankruptcy judge is guilty of judicial misconduct in failing to schedule proceedings which would determine the creditor's right to immediate enforcement of the bond against the surety. 9 MEALEY'S LITIGATION REPORTS, ASBESTOS, No. 12, at 7, E-1 (July 15, 1994).

Celotex almost two years after its bankruptcy filing and to which the Edwards are a party, is unresolved with no trial date scheduled or imminent. Before this Court issues its judgment in this case, the Celotex bankruptcy will have been pending for more than four years, with no end in sight. And the promise by Northbrook to pay the Edwards' judgment when final if Celotex could not do so, made pursuant to Federal Rule 62(d) in 1989, remains unfulfilled.

SUMMARY OF ARGUMENT

The Fifth Circuit properly held that the Celotex bankruptcy court's attempt to stay execution of supersedeas bonds under § 105 of the Bankruptcy Code did not preclude the district court from granting the relief sought by the Edwards against Northbrook under Rule 65.1. As Celotex itself concedes, a judgment or order issued by a court that does not have jurisdiction is void and is not binding on other courts. Unless the bankruptcy court had jurisdiction under 28 U.S.C. § 1334(b) to affect the rights of the Edwards, who are not parties to the Celotex bankruptcy, against Northbrook, the Fifth Circuit was under no obligation to honor the stay order as it applied to the Edwards.

In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 112 S. Ct. 459 (1991), this Court recognized that the broad jurisdiction granted by Congress to the bankruptcy courts under § 1334(b) is limited by other, more specific provisions of federal law. Similarly, in *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), this Court noted that absent a clear showing

that Congress intended to disturb state law and traditions, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law."

Celotex and Northbrook do not and cannot show that in enacting § 1334(b), Congress intended to vitiate the benefits granted to judgment creditors and judgment debtors by Rules 62(d) and 65.1 of the Federal Rules of Civil Procedure and corresponding state law governing the suspension and securing of money judgments. For more than two hundred years, federal law has permitted a party liable on a judgment to obtain a stay of execution pending appeal, but only if the judgment debtor posts a supersedeas bond or other security that would assure the judgment creditor full satisfaction upon completion of the appeal. The decisions of this Court recognize that the obligations of a surety on a supersedeas bond are more than merely contractual; they are grounded in law and tradition. Yet if bankruptcy courts were permitted to exercise jurisdiction over proceedings involving supersedeas bonds, the protections that bonds provide to judgment creditors would be eviscerated. Such an expansive interpretation of § 1334(b) would harm defendants as well as plaintiffs in civil cases, and would wreak havoc in the state and federal judicial systems. Courts would be more reluctant, or perhaps entirely unwilling, to approve supersedeas bonds, making it more difficult for defendants to obtain stays of execution; the courts would be compelled to supervise detailed post-judgment discovery concerning the nature of the relationship between the judgment debtor and the surety; and litigants would lose faith in the ability of the courts to protect and enforce their judgments. Congress could not have intended such

consequences in enacting § 1334(b). Absent a clear showing of such intent, the statute should not be interpreted to disturb ancient federal and state practices governing the suspension and bonding of judgments.

Celotex's commencement of an adversary proceeding within the bankruptcy case to invalidate all of the supersedeas bonds that it posted before its bankruptcy, including the Edwards' bond, did not give the bankruptcy court after-the-fact jurisdiction to enjoin the Edwards' motion against Northbrook. The bankruptcy court issued its stay order almost two years *before* Celotex commenced its adversary proceeding, and the order does not even purport to comply with the requirements for an injunction connected with an adversary proceeding specified by FED. R. BANKR. P. 65 and FED. R. CIV. P. 65. Moreover, the theories upon which Celotex seeks to set aside the Edwards' bond are frivolous. Celotex's contention that the bankruptcy court could affect Northbrook's liability to the Edwards on the bond under the theories of disallowance or equitable subordination is undermined by the plain language of 11 U.S.C. § 524(e), which provides that discharge of a claim against a debtor will not affect the liability of any other entity on that claim. Celotex's alternative allegation that its posting of the bond was "constructively fraudulent" because Celotex received "no value" for the bond defies common sense and flies in the face of precedent of this and other Courts recognizing the benefits that a judgment debtor enjoys by posting a supersedeas bond. Celotex's adversary proceeding thus does not support the exercise of jurisdiction by the bankruptcy court to impair the execution of the supersedeas bond against Northbrook in this case.

Finally, notions of comity did not require the Fifth Circuit to deny the Edwards relief in deference to the bankruptcy court's stay order. Although Celotex and Northbrook correctly state the general rule that courts should ordinarily give effect to injunctive orders issued by other courts, the general rule does not apply if the court that issued the order lacked jurisdiction to do so. Northbrook's characterization of the Fifth Circuit's refusal to honor the bankruptcy stay as "unseemly" is misplaced. It is the bankruptcy court's attempt to interfere with the ability of other federal courts to enforce their judgments, when such enforcement would not affect the bankruptcy estate, that violates notions of comity. The Fifth Circuit's refusal to defer to the bankruptcy court's attempt to exercise "absolute" power over parties not before it was appropriate under the circumstances of this case. The Fifth Circuit's judgment should be affirmed.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY UPHELD THE DISTRICT COURT'S ORDER ALLOWING EXECUTION ON THE SUPERSEDEAS BOND AGAINST NORTHBROOK NOTWITHSTANDING THE BANKRUPTCY COURT'S ORDER PURPORTING TO STAY EXECUTION ON SUPERSEDEAS BONDS GENERALLY, BECAUSE THE BANKRUPTCY COURT DID NOT HAVE JURISDICTION TO ISSUE THE ORDER.

A. If the Bankruptcy Court Lacked Jurisdiction To Issue the Stay Order, Then the Fifth Circuit Correctly Declined To Honor It.

Both Celotex and Northbrook concede that the Fifth Circuit properly allowed the Edwards to execute against

Northbrook on the supersedeas bond notwithstanding the bankruptcy court's stay order if the bankruptcy court was without jurisdiction to issue the order.[13] Celotex Br. at 26; Northbrook Br. at 15-17. This concession is well-advised, as it is supported by precedent of this Court and others. *See Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) (because filing of bankruptcy petition by farmer ousted state court of subject matter jurisdiction over foreclosure proceeding, subsequent action of state court "was not merely erroneous but was beyond its power, void, and subject to collateral attack"); *Vallely v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 353-54 (1920) (if courts act beyond authority delegated to them, "their judgments and orders are nullities. They are not voidable, but simply void, and this even prior to reversal"); *In re Sawyer*, 124 U.S. 200

[13] Despite its concession, Celotex suggestively cites this Court's opinions in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) and *Stoll v. Gottlieb*, 305 U.S. 165 (1938), hinting that even if the bankruptcy court lacked jurisdiction to stay execution of the supersedeas bond against Northbrook, then the stay must be given preclusive effect. Celotex Br. at 24, 30 n. 8. The cases are, however, distinguishable. Each involved a collateral attack on a bankruptcy order by a party that had previously appeared and asserted a claim in the bankruptcy and had had an opportunity to challenge the bankruptcy court's jurisdiction in the bankruptcy proceeding itself. *Chicot County Drainage Dist.*, 308 U.S. at 375 (noting that creditors "were parties" and "had full opportunity to present any objections to the proceeding"); *Stoll*, 305 U.S. at 177 ("we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent"). In contrast, the Edwards have not filed a claim against Celotex in the bankruptcy case. As Celotex ultimately appears to recognize, the Edwards therefore had no opportunity, and no obligation, to challenge the bankruptcy court's jurisdiction in that proceeding.

(1888) (holding contempt citation for violating injunction "null and void" because court issuing injunction had no jurisdiction to do so); *Querner v. Querner (In re Querner)*, 7 F.3d 1199, 1201 (5th Cir. 1993) ("Where a federal court lacks jurisdiction, its decisions, opinions, and orders are void").

Celotex and Northbrook are thus forced to attack the Fifth Circuit's conclusion that the bankruptcy court did not have jurisdiction to stay "all entities" from enforcing supersedeas bonds against third parties to the bankruptcy. But, as demonstrated below, the legislative history of the statutory grant of jurisdiction to the bankruptcy courts, the precedent interpreting the grant, and the policies underlying both supersedeas bonds and bankruptcy all support the Fifth Circuit's conclusion.

B. The Bankruptcy Court Lacked Jurisdiction To Restrain the Edwards from Executing Against Northbrook on the Supersedeas Bond.

It is axiomatic that "[b]ankruptcy courts are courts of limited jurisdiction, whose scope is statutorily defined." *Querner*, 7 F.3d at 1201. The "limited authority Congress has vested in bankruptcy courts," *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, ___, 112 S. Ct. 459, 464 (1991), is confined to jurisdiction over the debtor's property and property of the bankruptcy estate, 28 U.S.C. § 1334(d), and civil proceedings "arising in or related to title 11," 28 U.S.C. § 1334(b).

Celotex and Northbrook do not seriously contend that the bankruptcy court had exclusive jurisdiction over the Edwards' action to execute against Northbrook on the supersedeas bond. As the Fifth Circuit pointed out and

even the bankruptcy court acknowledged, Celotex's contingent interest in the supersedeas bond[14] had been extinguished prior to the bankruptcy by the affirmance of the Edwards' judgment against Celotex. The bankruptcy court had subject matter jurisdiction to issue orders affecting the bond, then, only if the proceedings on the bond were "related" to the Celotex bankruptcy itself within the meaning of § 1334(b).

1. The Jurisdictional Grant in § 1334(b) Is Limited and Must Be Harmonized with Other Federal Law.

Reading the briefs of Celotex and Northbrook, one would think that there are simply no practical limits to the exercise of bankruptcy jurisdiction under § 1334(b), so long as the bankruptcy court invokes § 105 in aid of its jurisdiction.[15] Celotex contends that because the bankruptcy court

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[14] More precisely, Celotex had a contingent interest in the collateral securing its reimbursement obligation to Northbrook in the event that Northbrook paid on the bond.

[15] Section 105(a) itself is not a jurisdictional grant; as 11 U.S.C. § 105(c) makes clear, in order for a bankruptcy court to issue an order under § 105(a), it must have jurisdiction under *some* provision of title 28. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1140 n.13 (6th Cir. 1991), *cert. dismissed*, 112 S. Ct. 1605 (1992). And as this Court has recognized, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Accordingly, the lower courts have noted that § 105 does not give the bankruptcy court "power to create substantive rights under the Code," *In re Morristown & Erie R.R.*, 885 F.2d 98, 100 (3d Cir. 1989), or "free-floating discretion to redistribute rights in accordance with [its] personal views of fairness, however enlightened those views might be," *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 791 F.2d 524, 528 (7th Cir. 1986).

had subject matter jurisdiction over the Celotex bankruptcy itself (a self-evident proposition that neither the Edwards nor the Fifth Circuit disputed), the bankruptcy court also had both jurisdiction under § 1334(b), and power under § 105, to issue any order purportedly related to the bankruptcy. Celotex Br. at 27. Northbrook similarly submits that because the Edwards' motion to enforce the bond could "conceivably," albeit indirectly, affect Celotex's bankruptcy estate, the bankruptcy court's stay order was an authorized exercise of its jurisdiction under § 1334(b). Northbrook Br. at 18 n.8.

Both Celotex and Northbrook interpret § 1334(b)'s grant to bankruptcy courts of jurisdiction over proceedings "related to" bankruptcy cases far too broadly. It is true, as Celotex and Northbrook emphasize, that in enacting § 1334(b) and its predecessor,[16] Congress intended to expand the jurisdiction of the bankruptcy courts. But the expansion was from an extremely narrow base; the jurisdiction of bankruptcy courts under prior law was quite

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[16] Congress enacted 28 U.S.C. § 1471(b), as part of the Bankruptcy Reform Act of 1978. That statute authorized federal district courts to exercise jurisdiction over civil proceedings "related to cases under title 11." Section 1471(c) in turn vested that jurisdiction in Article I bankruptcy courts. After the Supreme Court found the complete delegation of bankruptcy jurisdiction to Article I courts to be unconstitutional in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), Congress repealed § 1471 in its entirety and in its place enacted § 1334 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333. The grants of jurisdiction to district courts under § 1471(b) and § 1334(b) are identical. *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787 (11th Cir. 1990); *In re Wood*, 825 F.2d 90, 92-93 (5th Cir. 1987).

limited. The old Bankruptcy Act of 1898 authorized the bankruptcy courts to exercise in rem jurisdiction only over "property over which the debtor had actual or constructive possession." *Katchen v. Landy*, 382 U.S. 323, 327 (1966). Bankruptcy courts could exercise jurisdiction over property in which the debtor had solely an equitable interest only with the consent of the parties. *Id.* at 328. By extending bankruptcy jurisdiction to matters "related to" bankruptcy cases, Congress intended to eliminate the "idea of possession and consent as bases for jurisdiction," and to provide bankruptcy courts with "in personam as well as in rem jurisdiction in order that they may handle everything that arises *in a bankruptcy case*." S. REP. NO. 989, 95th Cong., 2d Sess. 153 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939 (emphasis added); *accord* H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 47-48, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6009 (noting Congress' intent to "confer jurisdiction over all litigation having a *significant connection with bankruptcy*") (emphasis added).

But nothing in the language or legislative histories of § 1334(b) and its predecessor, or in the cases interpreting the jurisdictional grant, indicates that Congress intended to endow bankruptcy courts with jurisdiction to issue orders that have *no* significant connection with bankruptcy or cannot affect the bankrupt party's estate. On the contrary, the courts have recognized that "Congress must have intended to put *some* limit on the scope of 'related to' jurisdiction." *Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir. 1983) (emphasis added); *accord Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161 (7th Cir. 1994) (although "[t]aken at its full breadth," § 1334(b) would allow the exercise of bankruptcy jurisdiction over a products liability claim against the purchaser of assets

in a bankruptcy sale, "the language should not be read so broadly"); *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987) ("The bankruptcy jurisdiction [under § 1334(b)] is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose").

Accordingly, this Court has recognized that the broad language of § 1334(b) does not provide bankruptcy courts with unbridled jurisdiction to enjoin proceedings in other forums that may affect the debtor. In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 112 S. Ct. 459 (1991), the Court considered whether the jurisdictional grant in 28 U.S.C. § 1334(b) permitted a district court sitting in bankruptcy to enjoin two pre-petition administrative proceedings brought by the Federal Reserve System against the debtor for violation of banking regulations. The Court held that the district court "lacked jurisdiction to enjoin either regulatory proceeding." 112 S. Ct. at 461. The Court first noted that administrative proceedings to enforce a governmental unit's police or regulatory power are expressly exempted from the automatic stay provisions of the Bankruptcy Code by 11 U.S.C. § 362(b)(4). *Id.* at 463-64. The Court rejected MCorp's contention that the administrative proceedings were acts to obtain or exercise control over property automatically stayed under §§ 362(a)(3) and 362(a)(6) of the Bankruptcy Code, noting that although the proceedings may ultimately affect the bankruptcy court's control over the property of the estate, "that *possibility* cannot be sufficient to justify the operation of the stay against an enforcement proceeding that it expressly exempted by subdivision (b)(4)." *Id.* at 464 (emphasis in original).

The Court then rejected MCorp's contention that the bankruptcy court could exercise concurrent jurisdiction over the administrative proceedings under § 1334(b), reasoning that maintenance of the proceedings "seem[ed] unlikely to impair the Bankruptcy Court's exclusive jurisdiction over the property of the estate protected by 28 U.S.C. § 1334(d)." *Id.* at 465. The Court acknowledged that if and when the Board sought to enforce an administrative order against the bankruptcy estate itself, "then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. § 1334(b)." *Id.* at 464. But because the proceedings themselves would not directly affect the bankruptcy estate, the Court explained, 28 U.S.C. § 1334(b) did not vest the district court with jurisdiction to enjoin them. *Id.* at 465.

Moreover, the Court held, § 1334(b) should not be interpreted to conflict with or supersede another more specific provision of federal law. The Financial Institutions Supervisory Act of 1966, the Court noted, included the provision that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order." *Id.* at 463 (quoting 12 U.S.C. § 1818(i)(1)). The plain language of § 1334(b), which purports to apply "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts," and which was enacted as law *after* the passage of 12 U.S.C. § 1818(i)(1), would appear to support that provision. Nonetheless, the Court concluded that "the specific preclusive language in 12 U.S.C. § 1818(i)(1) is not qualified or superseded by the general provisions governing bankruptcy proceedings on which MCorp relies." *Id.* at 465.

As in *MCorp*, the proceedings in this case purportedly enjoined by the bankruptcy court did not directly affect the bankruptcy estate. As the bankruptcy court and the Fifth Circuit agreed, Celotex no longer had any cognizable right to or interest in the supersedeas bond at the time of the bankruptcy. Thus, as in *MCorp*, the motion to execute against Northbrook would not "impair the bankruptcy court's exclusive jurisdiction over the property of the estate protected under § 1334(d)."

More importantly, as in *MCorp*, the scope of bankruptcy jurisdiction under § 1334(b) should be interpreted with reference to other federal law.[17] In *MCorp*, the Court recognized that although § 1334(b)'s grant of bankruptcy jurisdiction is virtually limitless in its terms,[18] it should not be read to conflict with or supersede the preclusive language of 12 U.S.C. § 1818(i)(1). Similarly, the Edwards contend, § 1334(b) should not be read to conflict with Federal Rules 62(d) and 65.1 and with the historical understanding and traditional function of supersedeas bonds.

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[17] *Cf. BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), discussed in this Brief *infra* at 46-47, in which this Court noted that the substantive provisions of the Bankruptcy Code "will be construed to adopt, rather than to displace, state law," absent a clear showing of contrary legislative intent.

[18] One commentator has observed that under the terms of the statute, "[c]onceptually, there is no limit to the reach of this jurisdiction." 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][e] (15th ed. 1983).

2. In View of the History and Purpose of Supersedeas Bonds, Congress Could Not Have Intended To Authorize the Exercise of Bankruptcy Jurisdiction over Claims on Supersedeas Bonds Made Solely Against Non-Debtors.

As this Court recognized more than a century ago, the practice of requiring a judgment debtor to post a bond in order to obtain a stay of execution pending appeal arose from statutes enacted in England in the seventeenth century. *Omaha Hotel Co. v. Kountze*, 107 U.S. 378, 381-84 (1883).[19] Prior to the enactment of these statutes, English common law did not require the posting of a bond to stay execution of a judgment; the writ of error itself served to supersede the judgment by directing that a writ of execution not be issued. *Id.* at 381. Recognizing the increasing tendency for judgment debtors to seek writs of error solely for purposes of delay, Parliament enacted statutes requiring the posting of "bail" to stay execution of a judgment pending appeal. ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 49 (1941). A statute of James I, enacted in 1606, provided that no execution should be stayed on any writ of error

> unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court wherein the judgment is given shall allow of, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court, in double the

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[19] See ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 47-51 (1941) for an exhaustive description of bonding practice in England prior to the American Revolution.

> sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the writ of error nonprossed, all and singular the debts, damages and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution.

3 James I, c.8 (1606). Two statutes of Charles II extended this measure to apply to all judgments after verdict on personal actions. POUND, *supra*, at 50 n.1 (citing 16 & 17 Charles II, c.8 (1665) and 22 & 23 Charles II, c.4 (1671)). Much of the ceremonious language in today's supersedeas bonds, such as the requirement that the appeals be prosecuted "with effect," is derived from these English statutes.

In this country, the obligations of a surety on a supersedeas bond were originally governed by statute. Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 85, required courts staying execution of a judgment to take "good and sufficient security" that the plaintiff in error "shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." This statute was interpreted to have "the same effect as the recognizance required by the English statutes, and was intended to secure payment of the original judgment, as well as damages for delay." *Kountze*, 107 U.S. at 386-87 (citing *Catlett v. Brodie*, 22 U.S. (9 Wheat.) 553 (1824)). This provision was later recodified as § 1000 of the Revised Statutes, retaining its purpose "to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse

the holding of the trial court." *Crane v. Buckley*, 203 U.S. 441, 446 (1906).

Because the posting of supersedeas bonds had been authorized and governed by statute, this Court recognized that such bonds were more than simple contracts between the judgment creditor, the judgment debtor, and its surety. For example, in *Kountze*, the Court held that rentals lost during the pendency of an appeal of a judgment in a foreclosure case were not recoverable under the supersedeas bond posted in the case, even though the language of the bond authorized such a recovery. The Court reasoned that

> [a]s an appeal bond, or bond in error, is a formal instrument required by the law and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of appeal is greatly affected by it, we think that it is not allowable, in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in.

107 U.S. at 395. Similarly, in *American Surety Co. of New York v. Schultz*, 237 U.S. 159 (1915), the Court ruled that an action by a judgment creditor (Schultz) against the surety on a supersedeas bond securing a federal judgment was an action arising under federal law, over which a federal district court could exercise subject matter jurisdiction even in the absence of diversity of citizenship. Distinguishing the action to enforce the supersedeas bond from "an ordinary action on a sealed instrument voluntarily given," *id.* at 159, the Court observed that

> while in a sense the supersedeas bond was the contract of the Surety Company, it was not made in pursuance of any agreement with Schultz, and could have been given over his objection, since the laws of the United States . . . declared that a writ of error could be obtained by the defendant filing an approved bond with surety, conditioned to make good his appeal. Such a bond operated to stay the judgment. Conversely, when that judgment was affirmed, the same laws of the United States gave Schultz a right of action on the bond, and in the suit to enforce that right the measure of the recovery depended upon the construction to be given the Federal statute.

Id.

In 1938, Congress replaced the relevant statutory provisions governing supersedeas bonds with Rules 62(d), 73(d) and 73(f) of the Federal Rules of Civil Procedure. Rule 73(f) had no statutory antecedent. It was intended to "provide[ ] a remedy in addition to any other remedies against sureties." FED. R. CIV. P. 73(f) advisory committee's note. In 1966, Congress incorporated the provisions of Rule 73(f) into new Rule 65.1 in order to provide a "single comprehensive rule" permitting "summary proceedings against sureties on bonds required or permitted by the rules." FED. R. CIV. P. 65(c) advisory committee's note to 1966 amendment. The remainder of Rule 73 was abrogated in 1968 with the adoption of the Federal Rules of Appellate Procedure. Although the specific provisions of Rule 73(d) concerning the form and amount of the bond were not incorporated in any other rule, courts have continued to look to the rule as a "useful guide on these matters." 11 CHARLES A. WRIGHT & ARTHUR R. MILLER,

FEDERAL PRACTICE AND PROCEDURE § 2905, at 327 (1973). Additionally, courts have recognized that they have "inherent power" to control the form and amount of security posted to stay enforcement of a judgment. *Id.* at 328; *see also C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973); *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 96 (S.D.N.Y. 1970), *aff'd*, 515 F.2d 173 (2d Cir. 1975).

Although the posting of supersedeas bonds is now governed by rule rather than by statute, the posting of a supersedeas bond in federal court continues to vest federally-recognized rights in both judgment debtors and judgment creditors. *See, e.g., American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S. Ct. 1 (Harlan, Circuit Justice 1966) ("a party taking an appeal from the District Court is *entitled* to a stay of a money judgment *as a matter of right* if he posts a bond in accordance with" the applicable federal rules) (emphasis added); *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980) (holding that the Federal Rules of Civil Procedure entitle a judgment creditor to "a full supersedeas bond . . . in normal circumstances" because "the purpose of the supersedeas bond is to secure the appellee from loss resulting from the stay of execution"). Rules 62(d) and 65.1, like their statutory antecedents, balance the interest of judgment debtors in delaying execution pending appeal against the interest of judgment creditors in insuring that the judgment will be just as collectible when it is finally affirmed as it was when it was entered. Rule 62(d) allows judgment debtors to obtain a stay of execution as a matter of right, but only if they protect judgment creditors from harm resulting from delay by causing a surety

to become independently liable on the judgment. Rule 65.1 affords further protection for judgment creditors by providing that the liability of the surety may be determined summarily and enforced quickly.

The state courts, like the federal courts, permit the posting of a supersedeas bond to suspend enforcement of a judgment as a fundamental protection for both judgment creditors and judgment debtors. 4 AM. JUR. 2D *Appeal and Error* § 369 (1962); 4 C.J.S. *Appeal and Error* § 409 (1993). Although the procedures for posting and enforcing the bonds vary from state to state,[20] the dual purpose of the bonds remains the same: to protect the judgment debtor against the risk of immediate but erroneous enforcement of the judgment, while protecting the judgment creditor from changed circumstances during appeal that would vitiate the creditor's ability to collect on the judgment.

In recognition of the purpose of supersedeas bonds, the courts, with the sole exception of the Celotex bankruptcy court, have universally concluded that obligations of third parties under supersedeas bonds posted by a judgment debtor before filing for bankruptcy protection are not property of the bankruptcy estate and should not

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[20] Texas, for example, provides an even more streamlined mechanism for enforcing supersedeas bonds than does FED. R. CIV. P. 65.1. In recognition of the independent liability that the surety assumes by executing a supersedeas bond, the surety on a supersedeas bond filed in a Texas court becomes a named party to the appellate judgment that affirms the trial court's award. TEX. R. APP. P. 82. Upon completion of the appeal, the judgment creditor need not even file a motion to enforce the judgment against the surety, but need only execute the appellate judgment against the surety.

be impaired by the bankruptcy court.[21] These decisions come both from bankruptcy courts and from state and federal courts of general jurisdiction determining the effect of bankruptcy filings on cases before them, and they interpret both the old Bankruptcy Act and the 1978 Bankruptcy Code with its expanded definition of "property of the estate," 11 U.S.C. § 541. More significantly, two of these decisions cite the Celotex bankruptcy court's June 13, 1991 decision staying enforcement of supersedeas bonds, but expressly reject its reasoning. *See Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935, 946 (BANKR. S.D.N.Y. 1994) (rejecting the Celotex bankruptcy court's analysis, "whatever merit this approach has as a case management technique," reasoning that if rights under a supersedeas bond "cannot be denied, they should not be delayed");[22] *Southmark Corp. v. Riddle (In re*

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[21] In chronological order, these decisions are *Saper v. West*, 263 F.2d 422 (2d Cir.), *cert. denied*, 360 U.S. 916 (1959); *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Invs.*, 518 F.2d 640 (3d Cir. 1975); *Atlantic Richfield Co. v. Good Hope Refins.*, 604 F.2d 865 (5th Cir. 1979); *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376 (Bankr. N.D. Ohio 1983); *Grubb v. FDIC*, 833 F.2d 222 (10th Cir. 1987); *Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172 (D. Colo 1987); *Carter Real Estate & Dev., Inc. v. Builder's Serv. Co.*, 718 S.W.2d 828 (Tex. Ct. App. 1988); *J.M. Beeson Co. v. Sartori*, 553 So. 2d 180 (Fla. Ct. App. 1989); *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348 (Fla. 1989); *Southmark Corp. v. Riddle (In re Southmark Corp.)*, 138 B.R. 820 (Bankr. N.D. Tex. 1992); and *Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935 (Bankr. S.D.N.Y. 1994).

[22] The *Keene* court held in a subsequent contempt proceeding that it had jurisdiction to restrain temporarily the enforcement of escrow agreements created to secure judgments against Keene pending its determination of whether Keene had a property interest in the escrows. *Keene v. Acstar Ins. Co. (In re Keene*

Southmark), 138 B.R. 820, 827-28 (BANKR. N.D. Tex. 1992) (rejecting the Celotex bankruptcy court's analysis by noting that "[t]he principal risk against which such bonds are intended as a protection is insolvency. To hold that the very contingency against which they guard shall, if it happens, discharge them, seems to us bad law and worse logic").

Northbrook's characterization of Celotex bankruptcy court's interference with enforceable supersedeas bonds as "novel," *see* Northbrook Br. at 24, then, is an understatement; the Celotex bankruptcy court's order regarding supersedeas bonds is a radical departure from prior law and has been repudiated by every other bankruptcy court that has considered it. But, as Celotex and Northbrook properly insist, the issue before this Court is not whether the bankruptcy court's interference with proceedings is proper or erroneous, but whether the court had the jurisdiction to do so.

In light of the history and purpose of supersedeas bonds, Congress could not have intended to authorize the exercise of bankruptcy jurisdiction under § 1334(b) to interfere with the enforcement of supersedeas bonds posted under the Federal Rules of Civil Procedure or under the law of any state. As the Fifth Circuit recognized below, the state and federal rules allowing stays of

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Corp.), 168 B.R. 285 (Bankr. S.D.N.Y. 1994). The *Keene* court did not hold, as Northbrook implies in its Brief at 22, that it had jurisdiction to restrain execution on property *after* it had determined that Keene had no interest. In any event, the *Keene* court did not analyze the scope of its jurisdiction under § 1334(b) to enjoin a proceeding not involving the debtor or potentially affecting the debtor's property.

execution as a matter of right upon the posting of supersedeas bonds would be eviscerated if § 1334(b) were interpreted to allow bankruptcy courts to exercise jurisdiction in order to interfere with the enforcement of the bonds. Federal Rules 62(d) and 65.1, and the supersedeas bond that Celotex posted to invoke them, promised the Edwards more than just a different, but equally contingent, source of payment if their judgment were affirmed. These rules and that bond promised the Edwards, in Celotex's words, "a streamlined procedure"[23] for recovering against Northbrook, and guaranteed the Edwards that they would not have to fight to enforce their rights under the bond in a distant forum. In betting parlance, Congress aimed to provide judgment creditors not just a "sure thing" but also a "fast track."[24] The promise made to the Edwards in the supersedeas bond and the Federal Rules, and thousands of promises like them made every day in the state and federal courts, would be undercut by a construction of § 1334(b) that allowed a federal bankruptcy court to exercise jurisdiction over a claim to a supersedeas bond by one non-party to a bankruptcy against another.

Celotex's argument that Congress intended, in its general grant of jurisdiction to the bankruptcy courts under § 1334(b), to undermine the protections of Rules 62(d) and 65.1 is not tied to any statutory language, not supported by any legislative history, and not endorsed by any court other than the one presiding over Celotex's

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[23] Celotex Br. at 37.

[24] Rule 65.1 even specifies the track by providing that the surety on a supersedeas bond "submits to the jurisdiction of the court" in which the bond is posted.

bankruptcy. It is also unsupported by common sense. Acceptance of Celotex's contention that a bankruptcy court has jurisdiction to enjoin the enforcement of obligations under supersedeas bonds posted in other courts would seriously damage the federal and state judicial systems in at least three significant respects:

- **Such a decision would make it harder for defendants to obtain stays of execution.**

A reversal in this case might delight Celotex, but it would also disappoint defendants and judgment debtors generally. As the Tenth Circuit observed in *Grubb v. FDIC*, 833 F.2d 222 (10th Cir. 1987), if the bankruptcy of the judgment debtor were to impair the judgment creditor's ability to execute on the supersedeas bond, defendants in civil cases would ultimately suffer. Recognizing that a trial court has discretion not to approve a bond offered to obtain a stay under Rule 62(d) if the bond does not provide the judgment creditor with adequate protection, the *Grubb* court predicted that

> trial courts would not grant stays of execution to potentially insolvent national banks, because any supersedeas bond posted by such a bank would not serve the purpose for which these bonds are intended. Instead, the banks would be forced to pay trial court judgments immediately, possibly driving them further toward insolvency.

833 F.2d at 227 n.3.

The *Grubb* court's prophesy is already coming to pass in the wake of the Celotex bankruptcy court's rulings. Courts in at least two states, aware of the Celotex

bankruptcy court's decisions on supersedeas bonds, have ruled that the customary supersedeas bond posted by the defendants is inadequate security because of the possibility that the defendant will seek bankruptcy protection and render the bonds worthless. *Owens-Corning Fiberglas Corp. v. Carter*, 630 A.2d 647 (Del. 1993); *Hyland v. Keene Corp. (In re Asbestos Litig.)*, No. 90C-MY-261, 1992 WL 310216 (Del. Super. Ct. Aug. 10, 1992); *Cardenas v. Owens-Corning Fiberglas Corp.*, No. 94-CA-606 (Colo. Ct. App. 1994), *aff'g* No. 93-CV-58-2 (Colo. Dist. Ct., Boulder, Apr. 20, 1994), *described in* 9 MEALEY'S LITIGATION REPORTS, ASBESTOS, No. 8, at 3, A-1 (May 20, 1994). The courts in these cases required the defendant to post a cash deposit with the court in order to obtain a stay. *Id.* Whether that type of security is any more immune from the jurisdiction of a bankruptcy court under Celotex's theory than the Edwards' supersedeas bond is in this case is open to debate, but the impulse of trial courts to protect judgment creditors from the effects of defendants' possible future insolvency is not. If this Court were to interpret § 1334(b) to enable a bankruptcy court to exercise jurisdiction over proceedings involving supersedeas bonds, rulings like those cited above would proliferate, to the prejudice of defendants in all types of civil cases.

- **Such a decision would create a new task for the courts – management of post-judgment discovery concerning the obligations supporting a supersedeas bond.**

If the Court were to allow bankruptcy courts to exercise jurisdiction over any proceedings involving a supersedeas bond based on the allegation that the bond is collateralized with the judgment debtor's property, trial

courts may simply require defendants in civil cases to post *unsecured* bonds – that is, bonds obtained through payment of a flat, nonrefundable fee to the surety rather than through the granting of a security interest in the debtor's property. As the Edwards have pointed out, Celotex did not volunteer to disclose the arrangement under which it obtained the supersedeas bond from Northbrook. Judgment creditors would have to obtain this type of information through discovery, which the federal and state courts would have to supervise. The effect on the courts would be immediate; judgment creditors in all cases *now on appeal* in the federal and state systems would be well-advised to seek discovery on the nature of the relationship between the judgment debtor and its surety on the supersedeas bond and, if necessary, to move to set aside the bond as inadequate security for the judgment. It is inconceivable that in enacting § 1334(b), Congress contemplated burdening the federal courts with the need to monitor this new type of discovery. Yet if Celotex's theory of unlimited bankruptcy jurisdiction were adopted and the holding below disturbed, such discovery would become an unwelcome, but undoubtedly routine, task for the courts.

- **Such a decision would erode the confidence of litigants in the integrity of the judicial process.**

As the Fifth Circuit subtly but poignantly noted, this case does not involve merely a promise from one private party to another. Rather, this case involves a series of commitments made to and by the court itself. Celotex, the Fifth Circuit noted, "made a promise to the prevailing plaintiffs *(and the court)* by posting the supersedeas bond

that the bond would 'secure the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal.'" 6 F.3d at 319, P.A. 17 (emphasis added) (quoting *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). In turn, the Edwards "were specifically promised *by the court* and by Celotex that they could look to the supersedeas bonds if they won on appeal." 6 F.3d at 320, P.A. 20 (emphasis added). The Court should be reluctant to interpret the jurisdictional grant of § 1334(b) in a way that would subvert these judicial promises.

* * *

Finally, Celotex contends that to the extent that the federal rules governing supersedeas bonds conflict with substantive rights conferred under the Bankruptcy Code, the federal rules must "give way." Celotex Br. at 39. But there is no such conflict, any more than the statute withdrawing jurisdiction to enjoin administrative proceedings considered by the Court in *MCorp* conflicted with the broad but general grant of bankruptcy jurisdiction in § 1334(b). The Edwards merely contend that here, as in *MCorp*, the jurisdictional inquiry of whether a proceeding is "related to" a bankruptcy must be informed by a comprehensive understanding of federal law and historical practice.

3. Celotex's Commencement of a Frivolous Adversary Proceeding Against Northbrook and the Edwards Almost Two Years *After* the Bankruptcy Court Issued Its Stay Order Did Not Give the Bankruptcy Court After-the-Fact Justification To Exercise Jurisdiction over Proceedings Involving the Bond.

Twenty-one months after the bankruptcy court issued its stay order and more than three years after Northbrook acceded to Celotex's request and executed a supersedeas bond in favor of the Edwards, Celotex filed an adversary proceeding in the bankruptcy court seeking to set aside that supersedeas bond. Celotex did not single out the Edwards in this action – Celotex sued *all 229 beneficiaries* of the more than 100 supersedeas bonds that it had posted before the bankruptcy on which its sureties were potentially liable. In its adversary proceeding, Celotex essentially claims that every supersedeas bond that it had posted before it filed for bankruptcy is a "constructive fraudulent transfer" and should therefore be invalidated by the bankruptcy court. Celotex maintains that the bankruptcy court's need to protect Celotex's claim to the property sought in the adversary proceeding necessitates the bankruptcy court's exercise of jurisdiction to stay enforcement of the supersedeas bonds against the sureties. Celotex Br. at 44-45. Northbrook advances the same argument, wishfully characterizing the stay order as an "interlocutory adjunct" to the adversary proceeding, over which the bankruptcy court "unquestionably" has core bankruptcy jurisdiction under 28 U.S.C. § 157. Northbrook Br. at 19.[25]

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[25] Although Celotex's adversary proceeding may be a "core proceeding" under 28 U.S.C. § 157, the Edwards vigorously

But the argument that because the bankruptcy court has jurisdiction over the adversary proceeding, it also has jurisdiction to enjoin the Edwards' claim against Northbrook, fails for two reasons. Primarily, and most obviously, the stay order was issued *not* as an "interlocutory adjunct" to the adversary proceeding, but as part of the bankruptcy court's general effort to bring "stability" to Celotex's bankruptcy case. 128 B.R. at 483, P.A. 43. The reliance of the bankruptcy court on the bankruptcy itself, rather than the adversary proceeding, to support its jurisdiction to enter the stay order is made clear by both direct and circumstantial evidence:

- the stay on execution of supersedeas bonds was issued, and reaffirmed twice, *before* Celotex commenced its adversary proceeding;

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dispute Northbrook's gratuitous suggestion that the proceeding involves "the restructuring of debtor-creditor relations" rather than "the adjudication of state-created private rights." Northbrook Br. at 19 n.9 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 71 (1982)). The Edwards have not filed a claim in the Celotex bankruptcy; the purpose of Celotex's adversary proceeding is to invalidate the Edwards' rights against Northbrook under state fraudulent conveyance law. Celotex's adversary proceeding does not seek the equitable distribution of its assets among its creditors but seeks to recoup additional funds from non-parties for the benefit of the bankruptcy estate. Because the Edwards have not filed claims against the Celotex bankruptcy estate, Celotex's adversary proceeding did not arise "as part of the process of allowance and disallowance of claims" and cannot be considered "integral to the restructuring of debtor-creditor relations." *Granfinaciera v. Nordberg*, 492 U.S. 33, 58 (1989).

- the stay order bears the caption of the bankruptcy case only, and not the caption of the adversary proceeding;

- the stay order does not identify any particular parties enjoined, as required by FED. R. BANKR. P. 7065 and FED. R. CIV. P. 65;

- the bankruptcy court expressly acknowledged in its omnibus stay order of June 13, 1991 that the stay was not connected with any adversary proceeding (indeed, Celotex would not file an adversary proceeding for almost two years), but was intended generally "to insure the integrity of the bankruptcy system and to protect the debtor in the initial stages" of the bankruptcy proceeding, 128 B.R. at 482 n.10, P.A. 40, n.10; and

- in its order declining to lift the omnibus stay on proceeding against supersedeas bonds, the bankruptcy court stated that its stay order was supported *not* by the probability that Celotex would prevail on the merits of its claims in its anticipated adversary proceeding, but by the probability that Celotex would "preserve the estate while simultaneously protecting or avoiding the claims of the judgment creditors." 140 B.R. at 914, P.A. 51.

The bankruptcy court's jurisdiction over the adversary proceeding did not vest – retroactively – the bankruptcy court with jurisdiction to enter a stay order that it was not otherwise authorized to enter.

The second reason that the filing of the adversary proceeding will not support the bankruptcy court's exercise of jurisdiction to stay the Edwards' attempt to

enforce the supersedeas bond against Northbrook is that the proceeding, at least insofar as it relates to the Edwards, is frivolous. Celotex contends that through its adversary proceeding, Northbrook's liability to the Edwards under the supersedeas bond could be reduced or eliminated under two theories. Celotex Br. at 9, 44. First, Celotex suggests that the bankruptcy court could disallow or subordinate the punitive damages component of the Edwards' claim against Celotex under 11 U.S.C. §§ 510(c), 726(a)(4), and 1129(a)(7), and thereby reduce Northbrook's liability to the Edwards. Second, Celotex asserts that the bankruptcy court could invalidate the supersedeas bond as a "constructively fraudulent conveyance[ ]" under 11 U.S.C. § 544 (in conjunction with applicable Florida law) because in posting the bond Celotex supposedly did not receive "reasonably equivalent value" for its indirect transfer to the Edwards. The first of these theories is belied by the plain language of the Code provisions upon which Celotex relies; the second is so internally illogical, so lacking in support in precedent, and so offensive to federal and state law authorizing the posting of supersedeas bonds to stay execution of judgments that it cannot possibly support the stay order.

As the Edwards have repeatedly noted, they have not asserted *any* claim against Celotex, much less a claim for punitive damages. Their claim under the supersedeas bond is against Northbrook and Northbrook alone. The Code provisions cited by Celotex that authorize disallowance or equitable subordination of claims apply by their terms only to claims against the debtor that would be satisfied out of the bankruptcy estate. *See* 11 U.S.C. § 502 (applicable to claims, "proof of which is filed under section 501 of this title"); 11 U.S.C. § 726 (describing the

way in which "property *of the estate* shall be distributed" (emphasis added)); 11 U.S.C. § 1129(a)(7) (describing effect of confirmation on "a holder of a claim" against the debtor). If any doubt as to the bankruptcy court's inability to disallow or equitably subordinate claims made against non-debtors remains after reading those provisions, it is eliminated by 11 U.S.C. § 524(e). That section specifically provides that, absent certain exceptions inapplicable here, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Thus, regardless of how the bankruptcy court resolves Celotex's adversary action to disallow or equitably subordinate punitive damages claims, it cannot possibly affect the Edwards' claim against Northbrook on the supersedeas bond.[26]

Celotex's second contention – that the supersedeas bond in favor of the Edwards may be avoided as a "fraudulent conveyance" – is even more bizarre. Celotex's argument hinges on the suggestion that Celotex did not receive "reasonably equivalent value" for posting the bond because "the recipient [presumably the Edwards] gave *no* value" to Celotex. Celotex Br. at 44 (emphasis in original). Such a contention defies the unambiguous terms of 11 U.S.C. § 548(d)(2)(A), which specifically defines value to include "the satisfaction *or securing* of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A) (emphasis added). Moreover, Celotex's

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[26] *See Keene Corp. v. Acstar Ins. Co. (In re Keene)*, 162 B.R. 935, 945-49 (Bankr. S.D.N.Y. 1994) (rejecting debtor's contention that disallowance or equitable subordination of punitive damage portions of final judgments against debtor could affect sureties' liability under supersedeas bonds, and thus denying injunction against enforcing the bonds against the sureties).

contention that the stay of execution that it sought and obtained under Rule 62(d) by posting the bond was not "reasonably equivalent value" for any indirect transfer that it made to the Edwards in order to obtain the stay is irreconcilable with this Court's recognition that the very purpose of supersedeas bonds is to benefit the judgment debtor by preventing immediate execution. *See, e.g., American Surety Co. of New York v. Schultz*, 237 U.S. 159, 162 (1915) (noting that the stay obtained by posting a supersedeas bond "was helpful to the defendant"). It was not the Edwards, but Celotex, that desired, and benefitted from, a stay of execution. Celotex's assertion that it did not receive value from the stay is simply untenable as a matter of common sense.

In *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757 (1994), this Court recognized that transactions regulated by state law cannot validly be attacked as fraudulent conveyances in an adversary action in a bankruptcy case. In *BFP*, the Court considered whether the sale of the debtor's mortgaged property at a foreclosure sale conducted under state law could be challenged as a fraudulent conveyance under § 548 of the Bankruptcy Code. The debtor contended that because the property was sold for far less than its fair market value, the debtor "received less than a reasonably equivalent value" in exchange for the transfer of its interest in the property within the meaning of § 548(d)(2)(A), and that the transfer was therefore avoidable. *Id.* at 1759. The Court rejected the contention, holding that the price paid for property at a state-authorized foreclosure sale conclusively establishes the "reasonably equivalent value" of the property. *Id.* at 1765. The Court noted that states have an interest in insuring the security of titles to real estate, and that state laws and procedures

regulating minimum prices at state foreclosure sales promote that interest. *Id.* at 1764-65. To allow debtors to use the bankruptcy laws to attack sales of property made in compliance with state law, the Court reasoned, "would have a profound effect upon that [state] interest: the title of every piece of realty purchased at foreclosure would be under a federally created cloud." *Id.* at 1765. Although the Court acknowledged that Congress has the power to "disrupt the ancient harmony" between foreclosure law and fraudulent conveyance law, it refused to presume a Congressional intent to disrupt that harmony, using language directly applicable to the case at bar:

> The Bankruptcy Code can of course override by implication when the implication is unambiguous. But *where the intent to override is doubtful, our federal system demands deference to long established traditions* of state regulation.

Id. at 1765 (emphasis added).

Celotex's contention that Congress intended to displace time-honored state *and federal* procedures for staying and securing court judgments in enacting § 544 of the Code is even less plausible. On the contrary, it is hard to imagine that Congress intended to permit a debtor to attack as "constructively fraudulent" a transfer that the debtor had voluntarily made pursuant to state or federal law more than a year before filing bankruptcy in order to obtain a stay of execution of a judgment pending appeal.

The language of the Code, and this Court's opinion in *BFP*, expose Celotex's adversary proceeding against the Edwards as pretextual and frivolous. Thus, even if the bankruptcy court's stay order can properly be considered an "adjunct" to the adversary proceeding, which the

Edwards deny, that proceeding still did not provide a colorable jurisdictional basis for the bankruptcy court to enjoin the Edwards' action against Northbrook.[27]

II. PRINCIPLES OF COMITY DID NOT OBLIGATE THE FIFTH CIRCUIT TO ENFORCE THE BANKRUPTCY COURT'S STAY ORDER.

Celotex correctly recites the rule stated by this Court in *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980), that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." But Celotex overlooks what one court has called the "principal qualification" of the *GTE* rule: "that the court which issued the order must have had jurisdiction to do so." *Illinois v. Department of Health & Human Services*, 594 F. Supp. 147 (N.D. Ill. 1984) (holding that because the federal court that issued a prior injunctive order had lacked jurisdiction to do so, the order was "void *ab initio*" and not binding on the litigants), *aff'd*, 772 F.2d 329 (7th Cir. 1985). Similarly, the cases upon which Northbrook relies to support its contention that comity requires deference to prior orders issued by other courts presuppose that the court entering the prior order had jurisdiction to do so. *See, e.g., Kerotest Mfg. Co. v. C-O Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Lapin v. United States*,

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[27] Indeed, if the stay order were tied to the adversary proceeding, which it was not, it could accurately be characterized as "transparently invalid" with only "a frivolous pretense to validity." *Walker v. City Birmingham*, 388 U.S. 307, 315 (1967).

333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964). *Kerotest, GTE*, and their progeny are simply inapplicable in the instant case, in which the Edwards contend (and the Fifth Circuit concluded) that the bankruptcy court's order exceeded its jurisdiction and was patently invalid.

Northbrook nevertheless insists that the Fifth Circuit's decision condoning the Edwards' collateral attack on the bankruptcy court's stay order is "unseemly" and violates general "principles of comity and federal jurisdiction." Northbrook Br. at 24-25. Northbrook has it backwards. It is the bankruptcy court, by seeking to exercise jurisdiction over claims to property in which the debtor can colorably claim no interest, that has failed to accord the requisite deference to proceedings in other courts. The supersedeas bond that the Edwards seek to enforce had been duly approved by order of the court in which it was deposited. The district court in Texas that approved the bond, not the bankruptcy court in Florida, was the appropriate court to determine the Edwards' right to the bond. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) ("the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts"); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964) (in proceedings in rem or quasi in rem, "the state or federal court having custody of such property has exclusive jurisdiction to proceed"). The Fifth Circuit justifiably and properly disregarded the bankruptcy court's extra-jurisdictional attempt to interfere with the proceedings in Texas, which were authorized by federal law.

Celotex suggests that affirmance of the Fifth Circuit's ruling would invite "conflict and chaos," because "federal courts would be free to collaterally attack and second-guess the orders of all other such courts – simply

because the deciding court disagrees with the merits of the other court's ruling." Celotex Br. at 36. Celotex's concern is hyperbolic and unwarranted. The Fifth Circuit disregarded the bankruptcy court's order not because it simply disagreed with it, but because the bankruptcy court lacked jurisdiction or power to interfere with the rights of parties not before it. If the Fifth Circuit's decision is affirmed, collateral attacks on bankruptcy court orders will continue to be appropriate only in those rare instances where, as here, a court attempts to exercise jurisdiction clearly beyond that delegated to it by Congress.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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